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No. 96-1923

In the Supreme Court of the United States

OCTOBER TERM, 1997

EDWARD S. COHEN, PETITIONER

v.

HILDA DE LA CRUZ, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

SETH P. WAXMAN
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
JEFFREY A. LAMKEN
Assistant to the Solicitor General
WILLIAM KANTER
ALISA B. KLEIN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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QUESTION PRESENTED

Under Section 523(a)(2)(A) of the Bankruptcy Code, the discharge of debts provided by 11 U.S.C. 727 does not apply to any "debt"—*i.e.*, any "liability on a claim," 11 U.S.C. 101(12)—"for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by * * * false pretenses, a false representation, or actual fraud." 11 U.S.C. 523(a)(2)(A). The question presented is:

Whether Section 523(a)(2)(A) limits nondischargeability to the amount of the debtor's actual gain from false pretenses, false representations, or actual fraud, regardless of the extent of injury imposed, the consequential harms caused, and the amount of damages awarded by reason of that misconduct.

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INTEREST OF THE UNITED STATES

Section 523(a)(2)(A) of the Bankruptcy Code, 11 U.S.C. 523(a)(2)(A), excepts from discharge in bankruptcy certain debts arising from the debtor's false pretenses, false representations, or actual fraud. The question in this case is whether that exception to discharge is limited to the value the debtor derived from such false or fraudulent misconduct. The United States has an interest in preventing the discharge in bankruptcy of debts resulting from awards under the False Claims Act, 31 U.S.C. 3729 *et seq.* False Claims Act awards are based on the injury to the government—not the gain to the debtor—and provide for treble damages and civil penalties as well. 31 U.S.C. 3729(a).

STATEMENT

1. The Nation's bankruptcy laws have long provided an insolvent debtor with the prospect of relief from over-

whelming debt through a "discharge" of such debt in bankruptcy. Those same laws, however, have also long excepted from discharge debt arising from the debtor's falsehoods or fraud. Thus, the Bankruptcy Act of 1867 provided that "no debt created by the fraud or embezzlement of the bankrupt * * * shall be discharged under this act." Act of Mar. 2, 1867, ch. 176, § 33, 14 Stat. 533.[1]

The Bankruptcy Act of 1898—which, with minor amendments, governed bankruptcy proceedings until 1978—contained a similar provision. Section 17a(2) of the Act originally provided for the discharge of all debts "except such as * * * are *judgments in actions for frauds, or obtaining property* by false pretenses or false representations," Act of July 1, 1898, ch. 541, 30 Stat. 550 (emphasis added), and was amended in 1903 to except from discharge all debts "such as * * * are *liabilities for obtaining property* by false pretenses or false representations," Act of Feb. 5, 1903, ch. 487, § 5, 32 Stat. 798 (emphasis added). The 1903 modification was designed to ensure that "all debts arising out of" false pretenses and misrepresentations would "be excepted from discharge," whether or not the creditor had reduced his claim to judgment. *Brown* v. *Felsen*, 442 U.S. 127, 138 (1979).

This case concerns Section 523(a)(2)(A) of the current Bankruptcy Code (the "Code"), which succeeded Section 17a(2) of the 1898 Bankruptcy Act. When Congress enacted the Bankruptcy Code in 1978, it provided a definition of the term "debt," defining it as "liability on a claim." 11 U.S.C. 101(12). Utilizing that definition, Congress also simplified Section 523(a)(2), eliminating awkward wording like the phrase "such as * * * are liabilities" found in former Section 17a(2). The new provision simply declared that "[a] discharge * * * does not discharge an individual debtor from any debt * * * for obtaining money, property, services, or an extension, renewal, or refinance of credit, by * * * false pretenses, a false representation, or actual fraud." 11 U.S.C. 523(a)(2)(A) (1982).

Congress amended the new Bankruptcy Code in 1984, primarily in response to this Court's decision in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982). Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333. As part of the 1984 amendments, Congress also revised the phrasing of Section 523(a)(2), deleting the words "obtaining" and "refinance of credit" and replacing the latter phrase with "refinancing of credit, to the extent obtained." *Id.* § 454(a)(1), 98 Stat. 375-376. As a result, Section 523(a)(2)(A) now bars the discharge of "any debt * * * for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by * * * false pretenses, a false representation, or actual fraud." 11 U.S.C. 523(a)(2)(A).

2. In 1989 the Hoboken, New Jersey, Rent Control Administrator determined that petitioner, the owner and manager of several apartment buildings in northeastern New Jersey, had charged his tenants—most of whom were not native English speakers and had very little education—rent that exceeded the maximum permitted by local law. Pet. App. 55a-60a. The Administrator ordered petitioner to refund $31,382.50 to his tenants. *Id.* at 3a.

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[1] The Bankruptcy Act of 1867 was repealed in 1878. Act of June 7, 1878, ch. 160, 20 Stat. 99. Its predecessor, the Bankruptcy Act of 1841, allowed any "person" with debts, "which shall not have been created in consequence of a defalcation as a public officer; or as executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity," to petition for bankruptcy. See Act of Aug. 19, 1841, ch. 9, § 1, 5 Stat. 441. The 1841 Act was repealed in 1843. Act of Mar. 3, 1843, ch. 82, 5 Stat. 614. The Nation's first Bankruptcy Act, Act of April 4, 1800, ch. 19, 2 Stat. 19, did not provide for voluntary bankruptcy. It was repealed by the Act of December 19, 1803, ch. 6, 2 Stat. 248.

Rather than comply with the order, petitioner in 1990 filed a petition seeking liquidation and the discharge of his debts under Chapter 7 of the Bankruptcy Code. Pet. App. 56a. The tenants commenced an adversary proceeding in bankruptcy court, alleging that petitioner's conduct in charging excessive rent had constituted "actual fraud" within the meaning of Section 523(a)(2)(A) and that the resulting debt was therefore nondischargeable. They further alleged that they were entitled to treble damages under New Jersey's Consumer Fraud Act, N.J. Stat. Ann. §§ 56:8-2, 56:8-19 (West 1989). Pet. App. 3a.

After a bench trial, the bankruptcy court ruled for the tenants. Pet. App. 55a-71a. The court first held that petitioner's conduct was fraudulent within the meaning of Section 523(a)(2)(A), because petitioner had recklessly disregarded—or perhaps willfully blinded himself to—Hoboken's rent control requirements. *Id.* at 67a-68a. The court found that petitioner had investigated and obtained "information from the Hoboken [Rent Control] Board where the result benefitted him and permitted him to pass on his costs," while "[a]voiding any investigation into potential rent control, where the result could be financially detrimental to [petitioner]." *Id.* at 68a. That conduct, the court concluded, "amount[ed] to a reckless disregard for the truth," *ibid.*, and constituted an "unconscionable commercial practice" under New Jersey's Consumer Fraud Act, *id.* at 50a. The court therefore awarded the tenants treble damages in the amount of $94,147.50. *Id.* at 51a-54a.

Acting *sua sponte*, the court also considered whether Section 523(a)(2)(A) prevents the discharge of any portion of the award that might be punitive. Pet. App. 51a-53a. Recognizing that two courts of appeals had disagreed on that question—compare *In re St. Laurent*, 991 F.2d 672 (11th Cir. 1993) (punitive damages nondischargeable) with

In re Levy, 951 F.2d 196, 198-199 (9th Cir. 1991) (punitive damages dischargeable), cert. denied, 504 U.S. 985 (1992)—the court found the reasoning of *St. Laurent* more persuasive. The court noted that the "to the extent obtained by" language, on which the *Levy* court had relied, was added to Section 523(a)(2)(A) in 1984. Pet. App. 52a & n.13. The court found no indication that Congress had thereby intended to alter the prior practice of excluding punitive damages from discharge where the compensatory award resulting from the same conduct was nondischargeable. *Id.* at 52a. In light of the Code's definition of the term "debt" as "liability on a claim," the court concluded that Section 523(a)(2)(A) encompasses an award of punitive damages, so long as it arises out of the same conduct as the compensatory award. *Id.* at 53a & n.14. The district court affirmed for similar reasons. *Id.* at 33a-35a.

3. a. The court of appeals affirmed. Pet. App. 2a-18a. In the court's view, "[l]iability under state law for damages caused by fraud, whether punitive or compensatory, clearly represents a debt within the meaning of the bankruptcy code." *Id.* at 8a. The court of appeals rejected the Ninth Circuit's view that the phrase "to the extent obtained by * * * actual fraud" modifies, and therefore limits, the term "debt." *Id.* at 9a. Rather, the court below reasoned, the quoted phrase modifies the terms that immediately precede it: "money, property, services, or an extension, renewal, or refinancing of credit." *Id.* at 9a-10a. Thus, the court concluded that the phrase "to the extent" does not distinguish between compensatory and punitive damages awarded on account of fraud, but instead distinguishes between damages arising from fraudulently obtained property and damages on account of mere breaches of contract or other nonfraudulent failures to pay. *Id.* at 10a.

The court of appeals found support for that construction in the history of Section 523(a)(2)(A). Pet. App. 10a-13a.

The 1978 version of the Code prevented the discharge of any debt "for obtaining money, property, services, or an extension, renewal, or refinance of credit, by * * * false pretenses, a false representation, or actual fraud." 11 U.S.C. 523(a)(2)(A) (1982). The court saw nothing in that language to suggest that the portion of a fraud judgment attributable to an award of punitive damages should be distinguished from the compensatory portion. Pet. App. 11a. And the court observed that other courts had construed the 1978 version of Section 523(a)(2)(A) just as they had construed the other exceptions from discharge found in Section 523(a)(4) and (a)(6): to encompass both punitive and compensatory damages. *Id.* at 11a-12a (citing cases). Noting that this Court has cautioned against "read[ing] the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure," *id.* at 11a (quoting *Pennsylvania Dep't of Pub. Welfare* v. *Davenport*, 495 U.S. 552, 563 (1990)), the court of appeals found "no reason to conclude that the 1984 amendments were anything but technical and cosmetic," *ibid.* (quoting *In re Gerlach*, 897 F.2d 1048, 1051 n.2 (10th Cir. 1990)).

Finally, the court reasoned that its holding is consistent with the purposes of the Bankruptcy Code. The court explained that the policy of affording a "fresh start" to debtors extends only to the "honest but unfortunate debtor." Pet. App. 13a (quoting *Grogan* v. *Garner*, 498 U.S. 279, 286-287 (1991)). The court found it unlikely that Congress "would have favored the interest in giving perpetrators of fraud a fresh start over the interest in protecting victims of fraud." *Ibid.* (quoting *Grogan*, 498 U.S. at 287).

b. Judge Greenberg dissented. Pet. App. 14a-18a. He agreed with the majority that the phrase "to the extent obtained by" modifies the terms "money, property, services, or an extension, renewal, or refinancing of credit," rather than the term "debt." *Id.* at 14a, 17a. He concluded, however, that the quoted phrase nonetheless permits the discharge of punitive damages, because punitive damages "do not reflect money, property, or services the debtor 'obtained.'" *Id.* at 14a-15a.[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

Although bankruptcy law has long offered the insolvent debtor the prospect of relief from overwhelming debt through the discharge of debt in bankruptcy, it also has long limited the availability of such relief to the "honest but unfortunate debtor." *Grogan* v. *Garner*, 498 U.S. 279, 286-287 (1991). Based on that principle, Section 17a(2) of the Bankruptcy Act of 1898 excepted from discharge all "judgments in actions for frauds, or obtaining property by false pretenses or false representations," Act of July 1, 1898, ch. 541, 30 Stat. 550, and as amended in 1903 excepted from discharge all "liabilities for obtaining property by false pretenses or false representations," Act of Feb. 5, 1903, ch. 487, § 5, 32 Stat. 798. Courts consistently interpreted Section 17a(2) as precluding the discharge of any liability arising from the debtor's fraud, including both compensatory and punitive damages.

The Bankruptcy Code enacted in 1978 carried much of the 1898 Bankruptcy Act's language forward, excepting from discharge "any debt * * * for obtaining money, property, services, or an extension, renewal, or refinance of credit, by * * * false pretenses, a false representation, or actual fraud." 11 U.S.C. 523(a)(2)(A) (1982). Section 523(a)(2) was amended in 1984, when Congress deleted the words "obtaining" and "refinance of credit," and replaced the latter phrase with "refinancing of credit, to the extent

[2] Petitioner's petition for rehearing and suggestion of rehearing en banc were denied with six judges dissenting. Pet. App. 1a.

obtained." Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 454(a)(1), 98 Stat. 375-376. As a result, Section 523(a)(2)(A) now bars the discharge of "any debt * * * for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by * * * false pretenses, a false representation, or actual fraud." 11 U.S.C. 523(a)(2)(A).

Petitioner claims that, as amended, Section 523(a)(2)(A) no longer excepts from discharge consequential and punitive damages arising from the debtor's fraud. Instead, petitioner asserts, the exception from discharge is limited to the value the debtor obtained, regardless of the extent of harm to the victim. This Court, however, "will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure." *Pennsylvania Dep't of Pub. Welfare* v. *Davenport*, 495 U.S. 552, 563 (1990). Petitioner can point to nothing in the text or history of Section 523(a)(2)(A) evidencing any such clear intent. To the contrary, the most natural reading of the text of Section 523(a)(2)(A) is that it continues to draw no distinction between punitive and compensatory damages.

Petitioner's argument rests on the erroneous assumption that a "*debt * * * for*" services or property obtained by fraud is, of necessity, limited to the value of the services or property the debtor received. The Bankruptcy Code defines "debt" as "liability on a claim." 11 U.S.C. 101(12). Liability for fraud typically includes compensatory damages based on the injury to the victim, often provides additional recovery (like fees and costs) necessary to make the victim whole, and may include punitive damages. Moreover, Section 523(a)(2)(A)'s predecessor barred the discharge of "liabilities for obtaining" money by fraud, and courts of appeals universally construed that provision as extending to punitive and consequential

damages. In any event, because petitioner concedes that the phrase "debt * * * for" used in other parts of Section 523(a) extends to both punitive and compensatory portions of an award, the phrase should not be construed in Section 523(a)(2) as extending to compensatory damages alone.

Petitioner contends that the phrase "to the extent obtained by" limits the nondischargeable debt to the value actually obtained by the debtor. But that phrase does not modify the word "debt," so as to render "debt" nondischargeable only "to the extent obtained by" fraud. Instead, most naturally read, the phrase "to the extent obtained by" modifies the words immediately preceding it, namely "money, property, services, or * * * credit." The phrase "to the extent obtained by" thereby serves to ensure that only debts arising from fraudulently obtained property or credit are rendered nondischargeable; thus, where a portion of the money, property, or credit involved was obtained in a nonfraudulent transaction, the resulting portion of the debt remains dischargeable. See *Field* v. *Mans*, 116 S. Ct. 437, 440 (1995) (Section 523(a)(2)(A) renders nondischargeable "debts traceable to falsity or fraud").

Petitioner's reliance on the structure of the Code and its history are misplaced. Contrary to petitioner's contentions, construing Section 523(a)(2)(A) to except consequential and punitive damages from discharge would not render Section 523(a)(4), which addresses "defalcation" and "fraud" by a fiduciary, superfluous; Section 523(a)(4) addresses constructive as well as actual fraud, and also reaches defalcation, which Section 523(a)(2) does not. Moreover, it is reasonable to expect that, if Congress had intended to alter past practice by limiting Section 523(a)(2)(A) to the value obtained by the debtor—thereby permitting the discharge of not only punitive but also consequential damages liability for fraud—there would be

some mention of that change in the legislative history. Yet there is none.

Finally, petitioner's appeal to policy is unavailing. Petitioner's construction would permit the dishonest debtor to obtain a discharge for most of his debt whenever the injury he caused exceeded the benefit he derived. It is singularly "unlikely that Congress * * * would have" so "favored the interest in giving perpetrators of fraud a fresh start over the interest in protecting victims of fraud." *Grogan*, 498 U.S. at 287.

ARGUMENT

SECTION 523(a)(2)(A) OF THE BANKRUPTCY CODE PREVENTS THE DISCHARGE OF ALL LIABILITY ARISING FROM THE DEBTOR'S FRAUD

Section 523(a)(2)(A) of the Bankruptcy Code prevents the discharge of "any debt * * * for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by * * * false pretenses, a false representation, or actual fraud." 11 U.S.C. 523(a)(2)(A). Petitioner does not dispute that the term "debt" as used in Section 523 is broad enough to include both compensatory and punitive damages.[3]

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[3] Under the Code, a "debt" is defined as "liability on a claim." 11 U.S.C. 101(12). The term "claim" is defined expansively as a "right to payment, whether or not such right is reduced to judgment." 11 U.S.C. 101(5)(A). A "right to payment" is "nothing more nor less than an enforceable obligation, regardless of the objectives * * * to [be] serve[d] in imposing the obligation." *Pennsylvania Dep't of Pub. Welfare* v. *Davenport*, 495 U.S. 552, 559 (1990). The courts of appeals uniformly have concluded that punitive damage awards are "debts" under the Code. Pet. App. 8a; see, *e.g.*, *In re Bugna*, 33 F.3d 1054, 1058 (9th Cir. 1994) ("A state court judgment, whether for punitive or compensatory damages, clearly represents a debt within the meaning of the Bankruptcy Code.").

Nonetheless, petitioner asserts that Section 523(a)(2)(A) limits nondischargeability to the value actually obtained by the debtor. Petitioner's position is inconsistent with the text of the Code (including the definition of "debt" in Section 101(12)), the structure of Section 523(a) as a whole, pre-Code bankruptcy practice, and the policies underlying the Code's discharge provisions.

A. The Text Of The Code

Petitioner's textual argument rests on the premise that a "debt * * * for money, property, services, or * * * credit, to the extent obtained by * * * actual fraud," must be equal to the value the debtor "obtained" through the fraud. Although petitioner does not expressly premise his construction on the meaning of the phrase "debt * * * for"—he confines his direct arguments to the meaning of the phrase "to the extent obtained by," see pp. 16-20, *infra*—his construction nonetheless relies on the assumption that a "debt for" property or services obtained by fraud must, by definition, be limited to the value of the property or services so obtained. Petitioner's assumption is incorrect.

1. Petitioner's premise is inconsistent with the definition of "debt" provided by the Bankruptcy Code and the meaning of "debt for" in the remainder of Section 523(a). The Bankruptcy Code defines "debt" as "liability on a claim." 11 U.S.C. 101(12). If that definition is substituted for the term "debt" in Section 523(a)(2)(A), that Section excepts from discharge "any 'liability on a claim' for money, property, services, or * * * credit" obtained by "false pretenses, a false representation, or actual fraud." Nothing in that text (or in common sense) suggests that the amount of "liability" on a claim must, of necessity, be limited to the amount the debtor gained as a result of his fraudulent conduct. To the contrary, the standard mea-

sure of liability for fraud or false representation is not the gain to the defrauder but the injury to the victim.[4] Moreover, liability on such claims often includes additional sums (such as attorney's fees and costs) necessary to make the creditor whole, and may include punitive damages as well. See Pet. App. 10a.

Petitioner's construction is also inconsistent with the meaning of the phrase "debt for" throughout Section 523(a). The phrase "any debt * * * for" introduces numerous exceptions from discharge. In each of those contexts—such as "debt * * * for * * * defalcation while acting in a fiduciary capacity," 11 U.S.C. 523(a)(4); "debt * * * for willful and malicious injury," 11 U.S.C. 523(a)(6); and "debt * * * for death or personal injury caused by the debtor's operation of a motor vehicle [while] intoxicated," 11 U.S.C. 523(a)(9)—the phrase "debt * * * for" has the same meaning: "liability on a claim" (11

[4] See, *e.g.*, 3 Restatement (Second) of Torts § 549, at 108-109 (1977) (recipient of false representation entitled to (a) the "difference between the value of what he has received * * * and its purchase price" *and* (b) "pecuniary loss suffered otherwise as a consequence"); U.C.C. §§ 2.721, 2.715 (1995) (remedies for fraud "include all remedies available * * * for non-fraudulent breach," which includes "[c]onsequential damages"); False Claims Act, 31 U.S.C. 3729(a) (basing damages on "the amount of damages which the Government sustains because of the act"); *DCD Programs, Ltd.* v. *Leighton*, 90 F.3d 1442, 1447 (9th Cir. 1996) (in securities fraud action, plaintiff may recover "the difference between the value of the consideration paid and the value of the securities received, plus consequential damages that can be proven with reasonable certainty"); *AMPAT/Midwest, Inc.* v. *Illinois Tool Works, Inc.*, 896 F.2d 1035, 1044-1045 (7th Cir. 1991) (Posner, J.) (fraudulent representation that bolts were sufficiently sturdy to hold in place plate glass windows on 60-story building sufficient to justify consequential damages for cost of replacing defective bolts); cf. *United States* v. *Leahy*, 82 F.3d 624, 638 (5th Cir. 1996) (for sentencing guidelines purposes, the extent of injury caused by fraud includes both the amount the defendant obtained and any additional costs incurred by the victim as a result of the fraud).

U.S.C. 101(12)) arising out of, because of, or in punishment of the specified misconduct.[5] And, as petitioner concedes, it is clear in each of those provisions that the nondischargeable debt includes any form of damages, whether restitutionary, consequential, or punitive, that arises out of that misconduct. See Pet. Br. 20-21 (acknowledging that Sections 523(a)(4), (6), and (9) prevent the discharge of punitive awards). Because the phrase "debt for" in other subparts of Section 523(a) means "liability on a claim" arising out of or in punishment of—and because that phrase covers both compensatory and punitive awards in those subparts—it should be given the same meaning and scope in Section 523(a)(2). See *Sullivan* v. *Stroop*, 496 U.S. 478, 484 (1990) ("identical words used in different parts of the same act" are generally construed "to have the same meaning"); *Ratzlaf* v. *United States*, 510 U.S. 135, 143 (1994) (same).[6]

[5] This is the ordinary meaning of the word "for." *Black's Law Dictionary* 644 (6th ed. 1990) (defining "for" as "by reason of," "on account of," "in consequence of," and "growing out of"); *The Random House Dictionary of the English Language* 747 (2d ed. 1987) (defining "for" as "because of" or "in punishment of").

[6] For this reason, alternative constructions through which one might imply equivalence between the amount of the debt and the value of the "money, property, services, or * * * credit" obtained by fraud are implausible. For example, it could be argued that the word "for" in the phrase "debt for" means "in consideration or payment of," or alternatively "in order to acquire." See *Random House Dictionary*, *supra*, at 747 (defining "for" as "in consideration or payment of," as in "three for a dollar," or "in order to obtain, gain, or acquire," as in a "suit for alimony"). But the phrase "debt for" cannot mean "debt in consideration of," or "debt in return for," because "debt" means "liability on a claim." It simply makes no sense to speak of "liability on a claim in consideration of" or "liability on a claim as payment of" the property obtained by fraud; the claim is not payment for the offense, but rather something that arises therefrom.

Defining "for" as "in order to acquire" might be consistent with defining "debt" as "liability on a claim," since it makes sense to speak

Indeed, in *Brown* v. *Felsen*, 442 U.S. 127, 138 (1979), this Court so construed the analogous phrase "liability for" in Section 523(a)(2)'s predecessor, Section 17a(2) of the Bankruptcy Act of 1898. As originally enacted, Section 17a(2) excepted from discharge "*judgments in actions for* frauds, or obtaining property by false pretenses or false representations." Act of July 1, 1898, ch. 541, 30 Stat. 550 (emphasis added). The amount rendered nondischargeable by that provision clearly could exceed the value of the property the debtor procured, because a "judgment in an action" could include amounts (such as attorney's fees, interest, or consequential damages) in excess of that value. Although Congress substituted the word "liabilities" for the words "judgments in actions" in 1903—thus excepting from discharge all debts that "are liabilities for obtaining property" by false pretenses or representations—this Court observed that Congress's use of "broad language" covering all "liabilities for obtaining property" by false means suggests "that all debts *arising out of* conduct specified in § 17 should be excepted from discharge." 442

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of "liability on a claim in order to acquire money * * * obtained by" fraud. See *Random House Dictionary*, *supra*, at 747 (example of a "suit for alimony"). One might then infer that, because such a claim is brought *only* to "acquire" the money obtained by fraud, the amount of liability is unlikely to exceed the value of the money being sought. Although this construction might be plausible if Section 523(a) referred only to liability on a claim "for money," it is inconsistent with the way Congress used the phrase "debt for" in Section 523(a) generally and in Section 523(a)(2) itself. When Congress in Section 523(a)(6) barred the discharge of "debt * * * for malicious and willful injury," surely it did not mean liability on a claim "in order to acquire" the injury. And it would be nonsensical to suggest that, when Congress in Section 523(a)(2)(A) itself exempted from discharge "debt * * * for * * * services" obtained by falsehoods or fraud, Congress meant liability on a claim to "acquire" services from the debtor. Pet. App. 10a. To the contrary, each time the phrase "debt for" appears in the Code, it means liability on a claim "arising from."

U.S. at 138 (emphasis added); see also pp. 26-27, *infra* (legislative history of change). There is no reason to read the phrase "debt for" in Section 523(a)(2) more narrowly.

In fact, courts both before and after enactment of the Bankruptcy Code in 1978 generally have read the phrases "liabilit[y] for" (1898 Act) and "debt for" (1978 Code) in precisely this fashion, as petitioner appears to concede. See Pet. 9 n.5. Thus, in *Coen* v. *Zick*, 458 F.2d 326 (9th Cir. 1972), the court held that both compensatory and punitive damages are nondischargeable as "liabilities * * * for willful and malicious injuries" under former Section 17a(2) because both "flow from," *i.e.*, arise out of, the same described "course of conduct." *Id.* at 329. The court stressed that "[t]he exception [from discharge] is measured by the nature of the act, *i. e.*, whether it was one which caused willful and malicious injuries. All liabilities resulting therefrom are non-dischargeable." *Ibid.* In *In re Houtman*, 568 F.2d 651 (9th Cir. 1978), the court used the same approach in holding that punitive damages are not discharged under Section 17a(2) "for obtaining money or property by false pretenses or false representations." *Id.* at 655. Case after case is to the same effect.[7]

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[7] See *Chernick* v. *United States*, 492 F.2d 1349 (7th Cir. 1974) (double damages and penalties awarded under Section 17a(2) for making false claims nondischargeable); *United States* v. *McQuatters*, 370 F. Supp. 1286 (W.D. Tex. 1973) (same); *In re Carpenter*, 17 B.R. 563 (Bankr. E.D. Tenn. 1982) (Section 523(a)(2) bars discharge of compensatory and punitive damages for fraudulent conduct); *In re Fellows*, 22 B.R. 40 (Bankr. E.D. Va. 1982) (Section 523 bars discharge of compensatory and punitive damages for fraud); *In re Maxwell*, 51 B.R. 244, 246 (Bankr. S.D. Ind. 1983) ("Punitive damages awarded pursuant to state law for actions which would render a debt nondischargeable, *see* 11 U.S.C.A. § 523(a)(2), (4) and (6) (West 1979), are nondischargeable in bankruptcy."); *In re Willis*, 2 B.R. 566, 568 (Bankr. M.D, Ga. 1980) (following *Coen*); *In re Webster*, 1 B.R. 61, 64 (Bankr. E.D. Va. 1979) (same). But see *In re Cheatham*, 44 B.R. 4, 9 (Bankr. N.D. Ala. 1984) (deciding "in the interest of fairness" that punitive damages awarded

Accepting the findings of the courts below, the full amount of petitioner's treble damages debt to respondents is nondischargeable under the plain terms of Section 523(a)(2)(A). The full amount of the award constitutes a "liability on a claim," 11 U.S.C. 101(12), and it arises from and is on account of "money, property, services, or * * * credit"—here, excessive rent payments—obtained by petitioner through fraud.

2. Petitioner does not dispute that a "*debt * * * for*" money, property, services, or credit obtained by fraud means liability on a claim arising from money, property, services, or credit obtained by fraud. Instead, petitioner argues (Br. 12-15) that Congress changed the meaning of Section 523(a)(2)(A) when it added the phrase "to the extent" in 1984. In particular, petitioner asserts that, because Section 523(a)(2)(A) now excepts from discharge "any debt * * * for money, property, services, or * * * credit, *to the extent obtained* by * * * false pretenses, a false representation, or actual fraud," Section 523(a)(2)(A) must be read to limit the amount of nondischargeable debt to the value the debtor actually gained by his fraud. Petitioner thus declares (Br. 13) that "[e]xemplary relief of any kind * * * exceeds th[e] statutory mandate because it does not involve value that was 'obtained' in any sense."

This Court "will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure." *Pennsylvania Dep't of Pub. Welfare* v. *Davenport*, 495 U.S. 552, 563 (1990). Congress's insertion of "to the extent obtained by"

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for fraud under Section 523(a)(2)(A) would be dischargeable). Petitioner incorrectly suggests (Br. 18) that *Carpenter* was decided under the 1970 version of Section 17a(2), which included a "willful and malicious conversion" component, see 11 U.S.C. 35(a)(2) (1970), rather than under the 1978 version of Section 523(a)(2), which did not.

into Section 523(a)(2) falls well short of providing a clear indication of such an intent. To the contrary, rules of ordinary usage demonstrate that the phrase "to the extent obtained by" cannot be read as limiting nondischargeable "debt" to the "value obtained" by the debtor. Instead, the quoted phrase specifies that the debt that is nondischargeable is that which arises from property or credit—or the portion of property or credit—that in fact was obtained by falsehood or fraud. It thus reflects the distinction not between compensatory and punitive damages, but rather between debts arising from fraudulent acquisition of money or property and those arising from mere breach of contract or other, more innocent failures to pay. Pet. App. 10a, 11a-12a.

While petitioner does not discuss the grammar undergirding his interpretation, the Ninth Circuit—the only appellate court to have accepted petitioner's construction—reasoned that the phrase "to the extent obtained by * * * actual fraud" modifies the term "debt." *In re Bugna*, 33 F.3d 1054, 1059 (1994) ("Congress specifically limited the application of section 523(a)(2) to 'debt . . . *to the extent obtained by* false pretenses, a false representation, or actual fraud'").[8] *Bugna*'s reasoning, however, is incorrect. As the court below recognized, the phrase "to the extent obtained by" is most naturally read as modifying not the word "debt," but rather the words that immediately precede it—"money, property, services," and "extension, renewal, or refinancing of credit." See Pet. App. 9a-10a; accord *In re Manley*, 135 B.R. 137, 145 (Bankr. N.D. Okla. 1992) ("the phrase 'to the extent obtained by'

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[8] See also *In re Levy*, 951 F.2d 196, 198 (9th Cir. 1991) (the phrase "to the extent obtained by" is intended "to limit the nondischargeable debt to the amount obtained by actual fraud") (internal quotation marks omitted), cert. denied, 504 U.S. 985 (1992).

actually modifies 'money, property, services, or . . . credit'"); see also *In re St. Laurent*, 991 F.2d 672, 679 (11th Cir. 1993). Even the dissent below rejected the Ninth Circuit's grammatical construction, because debts are not "obtained" by debtors, but rather are "incurred" by them: "After all, it would be awkward to think that the debtor 'obtained' a 'debt,' for what the debtor obtains is something of value, thus creating a debt." Pet. App. 14a (Greenberg, J., dissenting). Petitioner also appears to concede that the phrase "to the extent obtained by" limits not the scope of the "debt" that is nondischargeable, but rather the "money, property, services, or * * * credit" that the nondischargeable debt must be "for." See Pet. Br. 14 (referring to "money that has been 'obtained'").

Nonetheless, petitioner asserts (Br. 15) that the phrase "to the extent obtained by" must be read as excluding punitive damages from Section 523(a)(2)'s scope so as to avoid rendering that phrase superfluous. Petitioner overlooks the better explanation for that phrase. Because the phrase "to the extent obtained by * * * actual fraud" does not modify "debt," it does not distinguish between liability for compensatory damages and liability for punitive damages. Rather, it modifies the "money, property, services, or * * * credit" that give rise to nondischargeable debt, and thus specifies that only debt arising from fraudulently obtained property or credit (or, more importantly, from the portion of property or credit that was obtained by fraud) is rendered nondischargeable; any liability arising from the portion of property or credit obtained in a nonfraudulent transaction remains dischargeable. See *Field* v. *Mans*, 116 S. Ct. 437, 440 (1995) (Section 523(a)(2)(A) renders nondischargeable "debts traceable to falsity or fraud"). This distinction is important, especially where debt arises from a continuous course of dealing, such as in the context

of credit transactions. As the House Report on the 1978 Act explained:

> If an initial loan is made subject to a false financial statement and new money is advanced under a subsequent loan that is not made under conditions of fraud or false pretenses, then only the initial amount of the loan made on the original financial statement is invalidated and excepted from discharge.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 129-130 (1977).

Thus, by modifying the words "money, property, services, or * * * credit," the phrase "to the extent obtained by * * * actual fraud" clarifies that only such debt as arises from the portion of credit actually obtained by fraud is nondischargeable. Any liability arising from the portion not obtained by fraud—any debt that arises not as the result of fraud but rather from a breach in an otherwise honest transaction—is not subject to Section 523(a)(2)(A)'s prohibition on discharge. Pet. App. 10a; see *In re Manley*, 135 B.R. at 145 ("to the extent obtained by" language "does not distinguish actual from punitive damages; it distinguishes contractual debts tainted with fraud from debts for mere breach of contract or 'failure to pay'").

3. This conclusion is supported by Congress's contrasting use of the phrase "to the extent" in Section 523(a)(7), which precludes the discharge of any debt "*to the extent such debt* is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss." 11 U.S.C. 523(a)(7) (emphasis added). Contrary to petitioner's assumption (Br. 25), Congress placed the words "to the extent" in different locations in Section 523(a)(7) and Section 523(a)(2), and thereby produced different results. See *Hughey* v. *United States*, 495 U.S. 411, 418 (1990) (courts must give effect not only to the words of a statute,

but to their placement as well); *Adams Fruit Co.* v. *Barrett*, 494 U.S. 638, 645 (1990) (same). Whereas Section 523(a)(7) clearly applies the words of limitation "to the extent" to the word "debt"—barring discharge of the debt "to the extent *such debt* is for" a penalty—Section 523(a)(2) does not. Instead, it bars the discharge of liability on a claim "for money, property, services, or * * * credit, to the extent" the *money, property, services, or credit* were "obtained by * * * actual fraud." See pp. 17-19, *supra*.

Indeed, the clarity with which Section 523(a)(7) distinguishes between debt attributable to punitive damages and debt attributable to compensatory damages wholly undermines petitioner's contention that Section 523(a)(2) draws a similar distinction. It is reasonable to assume that, if Congress had meant Section 523(a)(2) to distinguish between punitive and compensatory awards, it would have borrowed Section 523(a)(7)'s clear language to achieve that result—excepting from discharge in Section 523(a)(2) any debt "to the extent *such debt* is compensation for actual loss" for property or services "obtained by fraud" and "not a fine, penalty, or forfeiture."[9] That Congress did not do so strongly undermines petitioner's contention that Section 523(a)(2) should be construed to achieve that very result.[10]

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[9] Similarly, if Congress had intended to except from discharge only the value the debtor obtained, it could have barred the discharge of any debt "to the extent such debt represents the value of"—or of any debt "up to the value of"—the property or services obtained by fraud. The concept of equivalent value is articulated elsewhere in the Code. See 11 U.S.C. 522(a)(2) ("fair market value"); 11 U.S.C. 548(a)(2)(A) ("reasonably equivalent value").

[10] Petitioner's reliance on *Collier on Bankruptcy* in support of his construction is unpersuasive. See Pet. Br. 15 (quoting 4 *Collier on Bankruptcy* ¶ 523.08[4], at 523-53 (15th rev. ed. 1997)). An earlier version of *Collier*'s took the opposite view, declaring that punitive damages are *not* dischargeable under the current version of Section 523(a)(2)(A). See Pet. 6 n.3 (noting *Collier*'s change in position); 3 *Collier on Bankruptcy* ¶ 523.08, at 523-52 n.27 (15th ed. 1996) ("[t]he phrase 'to the extent obtained by * * * actual fraud,' which was added to section 523 in 1984, should not be read to limit a finding of nondischargeability only to the compensatory aspect of a fraud judgment").

4. Petitioner's argument has far broader consequences than his brief might suggest. His construction would not merely permit the discharge of punitive damages for fraud; it would permit the discharge of *all* damages that exceed the value the debtor obtained through the fraud—no matter how great an injury he imposed on the creditor as a result. See Pet. Br. 14 (nondischargeability limited to debt "represent[ing] money that 'c[a]me into the possession' of * * * the debtor * * * and that w[as] 'procur[ed] or gain[ed], as the result of purpose and effort'") (quoting X *Oxford English Dictionary* 669 (2d ed. 1989)).

Consider, for example, a debtor who fraudulently represents to aircraft manufacturers that his steel bolts are aircraft quality, and obtains sales of $5,000 as a result. Even if the fraud causes a multi-million dollar airplane to crash—or forces manufacturers to spend millions retrofitting aircraft with replacement bolts—petitioner's construction would permit the discharge of all but the $5,000 the debtor actually "obtained."[11] It is singularly "unlikely that Congress * * * would have" so "favored the interest in giving perpetrators of fraud a fresh start over the interest in protecting the victims of fraud." *Grogan* v. *Garner*, 498 U.S. 279, 287 (1991).[12]

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[11] Such frauds are not as uncommon as one might hope. See, *e.g.*, *United States* v. *Gabriel*, 125 F.3d 89, 92-93 (2d Cir. 1997) (affirming conviction for shipping to airlines damaged jet engine parts with false representations that the parts had been repaired to the manufacturer's specifications).

[12] Perhaps it is for this reason that petitioner attempts to blur the distinction between compensatory (restitutionary) damages that reflect

B. The Structure Of The Code

Petitioner does not dispute that other provisions of Section 523(a) preclude the discharge of punitive as well as compensatory awards. See Pet. Br. 21-25 (conceding that Sections 523(a)(4) (fiduciary fraud or defalcation), 523(a)(6) (willful and malicious injury), and 523(a)(9) (death or injury caused by drunk driving) bar discharge of punitive awards). Nonetheless, petitioner asserts that Congress intended to afford debtors who obtain services or property by fraud and falsehood—and therefore fall within the terms of Section 523(a)(2)(A)—more favorable treatment.[13]

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the amounts the debtor "obtained" and compensatory damages that reflect consequential damages suffered by the victim. See Pet. Br. 12 (the language denies "discharge for the value of any 'money,' 'property,' 'services' or 'credit' that the creditor *has lost* as a result of the fraudulent conduct") (emphasis added); *id.* at 15 ("punitive damages are dischargeable under § 523(a)(2) because they are 'assessed in addition to the compensatory damages that are measured by the amount of property obtained by the fraudulent conduct *or actual harm suffered by the creditor*'") (quoting 4 *Collier on Bankruptcy* ¶ 523.08[4], at 523-53 (15th rev. ed. 1997) (emphasis added)).

[13] In the one provision that does distinguish between punitive and compensatory awards—Section 523(a)(7), which makes nondischargeability turn not on the culpability of the offender but on the identity of the creditor—Congress preserved the *punitive* portion of the award and permitted discharge of the compensatory portion. Petitioner quotes (Br. 24) this Court's decision in *Kelly* v. *Robinson*, 479 U.S. 36 (1986), for the proposition that "the limitation of § 523(a)(7) to fines assessed 'for the benefit of a governmental unit' was intended to prevent application of *that subsection* to wholly private penalties such as punitive damages." *Id.* at 51 n.13 (emphasis added). If petitioner means to suggest that Congress intended Section 523 to permit the discharge of liability for punitive damages generally because it expressly preserved them *only* with respect to governmental entities in Section 523(a)(7), his argument has no merit. As the Ninth Circuit has explained, "[e]ven if private creditors cannot avail themselves of section 523(a)(7), they can still rely on other subsections of section 523." *In re Levy*, 951 F.2d at 199. This construction of Section 523, of course, does

In particular, petitioner relies on Section 523(a)(4), which prevents the discharge of any debt (including consequential and punitive damages) "for fraud or defalcation" by a fiduciary. Congress, petitioner theorizes (Br. 22), must have intended to bar discharge of punitive damages under Section 523(a)(4), but not Section 523(a)(2)(A), because fiduciary fraud is more "egregious." Petitioner further asserts (Br. 22) that construing Section 523(a)(2)(A) to encompass punitive damages would render Section 523(a)(4) superfluous because, in his view, it would be "fully subsumed within the broader scope of (a)(2)."

Both assertions are incorrect. Petitioner's speculation that the fiduciary breaches enumerated in Section 523(a)(4) are more egregious ignores the terms of Section 523(a)(4). That Section, unlike Section 523(a)(2)(A), excepts from discharge debts resulting from "defalcation," conduct that can often be innocent. "In the context of Section 523(a)(4), the term 'defalcation' includes innocent, as well as intentional or negligent defaults so as to reach the conduct of all fiduciaries who were short in their accounts." *In re Lewis*, 97 F.3d 1182, 1186 (9th Cir. 1996) (citation omitted).[14] Petitioner's "egregious" argument

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not make Section 523(a)(7) superfluous: Section 523(a)(7) bars the discharge of any penalty payable to a governmental unit, regardless of the underlying conduct, while other provisions make nondischargeability depend on the conduct giving rise to the debt.

[14] Accord *In re Cochrane*, 124 F.3d 978, 984 (8th Cir. 1997) (following *Lewis*); *In re Schwager*, 121 F.3d 177, 185 (5th Cir. 1997) ("As an initial matter, it is clear that defalcation requires a lesser standard than fraud."); *Central Hanover Bank & Trust Co.* v. *Herbst*, 93 F.2d 510, 511 (2d Cir. 1937) (L. Hand, J.) ("Colloquially perhaps the word, 'defalcation,' ordinarily implies some moral dereliction, but in [the bankruptcy] context it may have included innocent defaults, so as to include all fiduciaries who for any reason were short in their accounts.") (construing the predecessor to Section 523(a)(4)). As one commentator has explained, "[b]ecause of the ease with which defalcation can be established (once a fiduciary relationship is shown), few cases are prosecuted

thus undermines his proposed construction of Section 523(a)(2)(A), for there is no reason to believe that Congress sought to preserve consequential and punitive awards arising from innocent "defalcation" by a fiduciary while discharging such awards when they arise from more culpable fraud.[15]

Nor does construing Section 523(a)(2) to except punitive damages from discharge render Section 523(a)(4), or any part of it, superfluous (Pet. Br. 22). Section 523(a)(4), as noted above, reaches "defalcation" by a fiduciary, which Section 523(a)(2) does not. More important, Section 523(a)(4) makes nondischargeable all debts for any sort of fiduciary "fraud," which may include both actual and constructive fraud. Section 523(a)(2)'s plain terms, by contrast, limit coverage of fraud to instances of "actual fraud."[16] Finally, unlike Section 523(a)(2), Section

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under the 'fraud' theory." D. Epstein, S. Nickles, & J. White, *Bankruptcy* § 7-28, at 519-520 (1993).

[15] In addition, petitioner's construction would produce limited liability even for the fraud that causes substantial injury, so long as the debtor earns only limited proceeds therefrom. See p. 21, *supra*. That result would not comport with the relative culpability structure that petitioner purports to promote. Besides, Section 523(a) does not represent a hierarchy of culpable conduct singled out for disfavored treatment, but rather a balance between the interests of competing parties, such as between governments and citizens who owe taxes and penalties, see 11 U.S.C. 523(a)(1) and (7), between creditors and debtors in revolving credit (*e.g.*, credit card) arrangements, see 11 U.S.C. 523(a)(2)(C), between divorced spouses, 11 U.S.C. 523(a)(5), between originators of student loans and defaulting students, 11 U.S.C. 523(a)(8), and between condominium organizations and individual condominium owners, 11 U.S.C. 523(a)(16). Compare *Field* v. *Mans*, 116 S. Ct. at 447 & n.13.

[16] See *Black's Law Dictionary*, *supra*, at 661 ("Actual fraud consists in deceit, artifice, [or] trick," whereas "[c]onstructive fraud consists in any act * * * contrary to legal or equitable duty"); see *Keene Corp.* v. *United States*, 508 U.S. 200, 208 (1993) (additional language found in section of a statute but not in another implies different meaning).

523(a)(4) does not require the debtor to "obtain" money, property, or services of the victim in order to render the debt nondischargeable; the provision bars discharge based on fraudulent conduct even if the fiduciary did not profit at all. Thus, interpreting both Section 523(a)(2) and Section 523(a)(4) to bar discharge of punitive damages does not render the latter (or any part of it) superfluous, because Section 523(a)(4) reaches conduct (defalcation and constructive fraud) that Section 523(a)(2) does not.[17]

C. The History Of Section 523(a)(2)

Before 1984, the Bankruptcy Code did not include the phrase "to the extent obtained by." The 1978 version of Section 523(a)(2)(A) simply barred the discharge of "any debt * * * for obtaining money, property, services, or an extension, renewal, or refinance of credit, by * * * false pretenses, a false representation, or actual fraud." 11 U.S.C. 523(a)(2)(A) (1982). Courts interpreted that provision as barring the discharge of both compensatory and punitive damages arising from the debtor's falsehood or fraud. Indeed, petitioner concedes that, "[p]rior to 1984, § 523(a)(2)(A) barred discharge of a 'debt for obtaining money by fraud,' which courts construed to bar discharge of both compensatory and punitive damages in fraud

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[17] Nor is it persuasive to suggest that punitive awards are more appropriately handled under Section 523(a)(6), which excepts from discharge debts for "willful and malicious injury" (see Pet. Br. 23 (citing *Grogan*, 498 U.S. at 282 n.2)), because petitioner's construction would preclude victims of fraud from recovering even their consequential damages under Section 523(a)(2)(A). There can be no contention that Section 523(a)(6) is the more appropriate provision for claims for consequential harm, because that provision furnishes no protection for victims of "reckless" fraud, while Section 523(a)(2) does. In addition, depending on this Court's decision in *Kawaauhau* v. *Geiger*, No. 97-115 (to be argued Jan. 21, 1998), Section 523(a)(6) may not apply where the debtor did not *intend* to cause the injury, but merely intended to perform the act that happened to produce the injury.

cases." Pet. 9. n.5; see also pp. 14-15 & n.7, *supra*; p. 27 & n.18, *infra*.

1. Recognizing that this Court "will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure," *Pennsylvania Dep't of Pub. Welfare*, 495 U.S. at 563, petitioner now suggests (Br. 17) that even the language of the Code as enacted in 1978 was "arguably ambiguous, since the liability 'for obtaining' money by fraud might be construed to reach only the money actually obtained by fraud." Even if we ignore petitioner's concession that the courts held to the contrary (Pet. 9 n.5), it is difficult to see how that assertion could be correct.

The fraud exception found in the 1898 Bankruptcy Act lacked the "for obtaining" language that petitioner suggests may be ambiguous. Instead, Section 17a(2) of that Act excepted from discharge all debts that "are *judgments in actions for frauds*, or obtaining property by false pretenses or false representations." 30 Stat. 550 (emphasis added). Nothing in that language suggests that "judgments" in actions for fraud were limited to the amount obtained by the debtor in fraud, or were exclusive of consequential and punitive damages awarded by the courts.

In 1903, Congress replaced the words "judgments in actions" with the word "liabilities" and introduced the "for obtaining" language on which petitioner relies for ambiguity. The Act thus excepted from discharge debts that "are liabilities for obtaining property by false pretenses or false representations." Act of Feb. 5, 1903, ch. 487, § 5, 32 Stat. 798. Even then, Congress made clear its intent to reach any liability growing out of such an offense. As the 1903 House Report explained, the substitution of the word "liabilities" for the phrase "judgments in actions" was designed to "make[] the clause *broader*"; to ensure

that claims "*created by fraud*" would not be subject to discharge simply because they had not been "reduced to judgment"; and "to exclude beyond peradventure certain liabilities *growing out of* offenses against good morals [like fraud] from the effect of a discharge." H.R. Rep. No. 1698, 57th Cong., 1st Sess. 6 (1903) (emphasis added); see *Brown* v. *Felsen*, 442 U.S. at 138 (citing House Report).

This Court so construed the phrase "liabilities for obtaining" in *Brown* v. *Felsen*, explaining that its broad terms indicated that "all debts *arising out of* conduct specified in § 17 should be excepted from discharge." 442 U.S. at 138 (emphasis added). And the courts of appeals uniformly read the provision that way as well, concluding as a result that it excepted from discharge compensatory, consequential, and punitive damages alike.[18] There is no indication anywhere that Congress sought to discard that practice when it replaced the words "liabilities for" with the largely synonymous words "debt for" in the 1978 Code. To the contrary, the legislative history evidences continuity of intent.[19]

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[18] *In re St. Laurent*, 991 F.2d at 679 (referring to "pre-1978 practice of holding debts for punitive damages nondischargeable if the compensatory damages 'that flow[ed] from one and the same course of conduct' were themselves nondischargeable"); Pet. 9 n.5; Pet. App. 10a; see, *e.g.*, *Coen*, 458 F.2d at 329 ("liabilities * * * *for* willful and malicious injuries" include punitive and compensatory awards because both "flow from" the same conduct); *In re Houtman*, 568 F.2d at 655 (same construction of Section 17a(2) "for obtaining money or property by false pretenses or false representations"); *Chernick* v. *United States*, 492 F.2d 1349 (7th Cir. 1974) (double damages and penalties for making false claims nondischargeable under Section 17a(2)); see also note 7, *supra* (citing additional cases).

[19] See S. Rep. No. 989, 95th Cong., 2d Sess. 78 (1978) ("Paragraph 2 provides that *as under Bankruptcy Act § 17a(2)*, a debt for obtaining money, property, services, or a refinancing extension or renewal of credit by false pretenses, a false representation, or actual fraud * * * is excepted from discharge. This provision is modified only slightly

2. In any event, petitioner primarily relies on the 1984 amendment to the Code, Pub. L. No. 98-353, § 454(a)(1), 98 Stat. 375-376. But nothing about the changes made in 1984 —striking the word "obtaining" and replacing the words "refinance of credit" with "refinancing of credit, to the extent obtained by"—provides the "clear indication" of departure from prior practice that this Court requires. *Pennsylvania Dep't of Pub. Welfare*, 495 U.S. at 563; cf. *Dewsnup* v. *Timm*, 502 U.S. 410, 417 (1992) (even where Court might interpret law differently if "writing on a clean slate," Court will not "depart from the pre-Code rule" given "ambiguity in the text"). To the contrary, basic principles of usage require that the phrase "to the extent obtained by" not be read as distinguishing between punitive and compensatory damages, but rather as distinguishing between debt arising from property obtained by fraud and debt arising from honest transactions. See pp. 17-18, *supra*.

Moreover, it is reasonable to suppose that, if Congress had intended to alter the law—and thus to favor the perpetrators of fraud over injured creditors—there would be some mention of that change in the legislative history. Yet the legislative history makes no mention of such a purpose.[20] Given the absence of any clear indication of

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from current section 17a(2)," as " 'actual fraud' is added as a ground for exception from discharge," "reliance [on a false statement] must have been reasonable," and the phrase "in any manner whatsoever" is "deleted as unnecessary.") (emphasis added); see also H.R. Rep. No. 595, *supra*, at 364 (similar language).

[20] *United Sav. Ass'n* v. *Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 380 (1988) ("[I]t is most improbable that [a major change] would have been made without even any mention in the legislative history."); *Dewsnup*, 502 U.S. at 419 (Court "has been reluctant to accept arguments that would interpret the Code * * * to effect a major change in pre-Code practice that is not the subject of at least some

intent to alter the law in the text of the Code or its history, the court below, like two courts of appeal before it, properly found "no reason to conclude that the 1984 amendments were anything but technical and cosmetic." Pet. App. 11a (quoting *In re Gerlach*, 897 F.2d 1048, 1051 n.2 (10th Cir. 1990)); accord *In re St. Laurent*, 991 F.2d at 680.[21]

D. The Purposes Of The Bankruptcy Code

Finally, petitioner contends (Br. 30) that the decision below unnecessarily disrupts the Code's policy of providing insolvent debtors with a "fresh start," and instead "protect[s] the commercial interests of large enterprises seeking a right to pursue amounts much larger than what they have in fact lost."

Petitioner provides no support for his assertion that large enterprises are the most likely victims of fraud; as this very case reflects, frauds are often perpetrated on society's most vulnerable members. Moreover, petitioner's construction would not simply deprive victims of the right to recover "amounts much larger than what they have in fact lost." It would deprive victims of the right to recover even so much as they have lost whenever the perpetrator happened to "obtain" less than what the victim lost. See p. 21, *supra*.

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discussion in the legislative history"); compare *Sale* v. *Haitian Centers Council, Inc.*, 509 U.S. 155, 174-176 (1993).

[21] Indeed, the nature of the changes made with the introduction of the words "to the extent"—changing the word "refinance" to "refinancing" and "obtaining" to "obtained"—strongly suggests that no substantive revision was intended. See *McElroy* v. *United States*, 455 U.S. 642, 651 n.14 (1982) (although Congress changed the language, Court concluded that no change in meaning was intended where "the legislative history contains no indication that the variation in the language had changed the meaning" and the Act was "drafted to follow" prior language).

In any event, while the Code does have at its core a "fresh start" policy, Congress has "limit[ed] the opportunity for a completely unencumbered new beginning to the 'honest but unfortunate debtor.'" *Grogan*, 498 U.S. at 286-287. Petitioner's construction, however, would discharge the debt of a dishonest debtor at the expense of the truly injured whenever the victim's injury exceeded the amount of the debtor's gain. Because it is singularly "unlikely that Congress * * * would have" thus "favored the interest in giving perpetrators of fraud a fresh start over the interest in protecting victims of fraud," *id.* at 287, the Court should not adopt such a construction unless the text admits of no other reading. The text of Section 523(a)(2) not only permits a reading that encompasses *all* damages awarded on account of money, property, services, or credit obtained by fraud. It is most naturally read to require that result.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
JEFFREY A. LAMKEN
Assistant to the Solicitor General
WILLIAM KANTER
ALISA B. KLEIN
Attorneys

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